

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CESAR E. ROMERO-MANZO,

Case No. 3:22-cv-00475-ART-CLB

Petitioner,

ORDER

v.

TIMOTHY GARRETT, et al.,

Respondents.

This counseled habeas petition comes before the Court on Respondents' motion to dismiss. (ECF No. 27.) Petitioner Cesar E. Romero-Manzo opposed the motion, and Respondents replied. (ECF Nos. 32, 38.) For the reasons stated below, the Court denies the motion.

II. BACKGROUND

In affirming Romero-Manzo's judgment of conviction, the Nevada Court of Appeals summarized the facts from Romero-Manzo's trial as follows:

The jury heard testimony that Romero-Manzo was jealous and angry because the victim was dating Romero-Manzo's ex-girlfriend, there was "bad blood" between Romero-Manzo and the victim, and Romero-Manzo threw a rock through the window of the victim's car. When the victim drove to confront Romero-Manzo about throwing the rock, Romero-Manzo crashed his vehicle into the side of the victim's vehicle, disabling it. The victim exited his vehicle with a metal bat. Romero-Manzo exited his vehicle with a gun wrapped in a blue bandana and pointed it at the victim as they walked toward each other. Romero-Manzo uttered an expletive and then shot the victim once in the chest from approximately four feet away.

(ECF No. 24-42 at 3.) A jury found Romero-Manzo guilty of attempted murder with a deadly weapon and battery with the use of a deadly weapon. (ECF No. 22-9.) The state court sentenced Romero-Manzo to an aggregate term of 192 to 480 months in prison. (*Id.*) Romero-Manzo appealed, but the Nevada Supreme Court dismissed the appeal as untimely. (ECF No. 22-19.)

Romero-Manzo petitioned for state postconviction relief. (ECF No. 22-23.) The state court appointed counsel for Romero-Manzo, and counsel filed a supplemental petition. (ECF No. 22-45.) The state court granted the petition, in

1 part, and denied the petition, in part. (ECF No. 24-13.) Specifically, the state
 2 court concluded that Romero-Manzo “established a valid appeal-deprivation
 3 claim.” (*Id.* at 9.) Romero-Manzo appealed his judgment of conviction under NRAP
 4(c).¹ (See ECF No. 24-42.) The Nevada Court of Appeals affirmed Romero-
 5 Manzo’s judgment of conviction. (*Id.*)

6 Romero-Manzo initiated this federal habeas case on or about October 26,
 7 2022. (ECF No. 1.) This Court instructed Romero-Manzo to file an amended
 8 petition on the appropriate form and either pay the filing fee or file an *in forma*
 9 *pauperis* application. (ECF No. 3.) Romero-Manzo complied. (ECF Nos. 4, 6, 8.)
 10 Romero-Manzo then moved for the appointment of counsel. (ECF No. 10.) This
 11 Court granted the motion and formally appointed the Federal Public Defender on
 12 January 13, 2023. (ECF Nos. 11, 14.) Romero-Manzo filed his counseled second-
 13 amended petition on May 16, 2023. (ECF No. 17.) Romero-Manzo presents the
 14 following grounds for relief: his trial counsel failed to cross-examine Juan Orozco
 15 using his prior inconsistent statements (ground 1(a)), his trial counsel failed to
 16 object to Detective Shawn Congdon’s unqualified expert testimony regarding
 17 whether the gun misfired (ground 1(b)), and there was insufficient evidence to
 18 support his conviction of attempted murder (ground 2). (*Id.*)

19 III. DISCUSSION

20 Respondents argue that grounds 1(a) and 1(b) are unexhausted and
 21 procedurally defaulted. (ECF No. 27 at 4.)

22 A. Legal standard

23 A state prisoner first must exhaust state court remedies on a habeas claim

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 25 ¹ NRAP 4(c) allows “[a]n untimely notice of appeal from a judgment of conviction
 26 and sentence” when “[a] postconviction petition for a writ of habeas corpus . . .
 27 assert[s] a viable claim that the petitioner was unlawfully deprived of the right to
 28 a timely direct appeal from a judgment of conviction and sentence” and “[t]he
 district court . . . enters a written order containing . . . specific findings of fact
 and conclusions of law finding that the petitioner has established a valid appeal-
 deprivation claim and is entitled to a direct appeal.”

1 before presenting that claim to the federal courts. 28 U.S.C. § 2254(b)(1)(A). This
 2 exhaustion requirement ensures that the state courts, as a matter of comity, will
 3 have the first opportunity to address and correct alleged violations of federal
 4 constitutional guarantees. *Coleman v. Thompson*, 501 U.S. 722, 730–31
 5 (1991). “A petitioner has exhausted his federal claims when he has fully and fairly
 6 presented them to the state courts.” *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th
 7 Cir. 2014) (citing *O’Sullivan v. Boerckel*, 526 U.S. 838, 844–45 (1999) (“Section
 8 2254(c) requires only that state prisoners give state courts a *fair* opportunity to
 9 act on their claims.”)). To satisfy the exhaustion requirement, a claim must have
 10 been raised through one complete round of either direct appeal or collateral
 11 proceedings to the highest state court level of review available. *O’Sullivan*, 526
 12 U.S. at 844–45; *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (en
 13 banc). A properly exhausted claim “must include reference to a specific federal
 14 constitutional guarantee, as well as a statement of the facts that entitle the
 15 petitioner to relief.” *Woods*, 764 F.3d at 1129 (quoting *Gray v. Netherland*, 518
 16 U.S. 152, 162–63 (1996)); *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005)
 17 (fair presentation requires both the operative facts and federal legal theory upon
 18 which a claim is based).

19 **B. Analysis**

20 Romero-Manzo admits that grounds 1(a) and 1(b) have not been exhausted,
 21 but he argues that (1) they are technically exhausted and procedurally defaulted,
 22 and (2) he can overcome the procedural default pursuant to *Martinez v. Ryan*.
 23 (ECF No. 32.)

24 A claim may be considered procedurally defaulted if “it is clear that the
 25 state court would hold the claim procedurally barred.” *Sandgathe v. Maass*, 314
 26 F.3d 371, 376 (9th Cir. 2002). Romero-Manzo would face several procedural bars
 27 if he were to return to state court. *See, e.g.*, Nev. Rev. Stat. §§ 34.726 & 34.810.
 28 Nevada has cause and prejudice and fundamental miscarriage of justice

1 exceptions to its procedural bars, which are substantially the same as the federal
 2 standards. If a petitioner has a potentially viable cause-and-prejudice or actual-
 3 innocence argument under the substantially similar federal and state standards,
 4 then petitioner cannot establish that “it is clear that the state court would hold
 5 the claim procedurally barred.” *Sandgathe*, 314 F.3d at 376. For that reason, the
 6 courts in this district have generally declined to find a claim subject to
 7 anticipatory procedural default unless the petitioner represents that he would be
 8 unable to establish cause and prejudice in a return to state court. In such a case,
 9 the claim would generally be subject to immediate dismissal as procedurally
 10 defaulted, as the petitioner would have conceded that he has no grounds for
 11 exception to the procedural default in federal court.

12 A different situation is presented, however, where the Nevada state courts
 13 do not recognize a potential basis to overcome the procedural default arising from
 14 the violation of a state procedural rule that is recognized under federal law. In
 15 *Martinez v. Ryan*, the Supreme Court held that the absence or inadequate
 16 assistance of counsel in an initial-review collateral proceeding may be relied upon
 17 to establish cause excusing the procedural default of a claim of ineffective
 18 assistance of trial counsel. 566 U.S. 1, 9 (2012). The Nevada Supreme Court does
 19 not recognize *Martinez* as cause to overcome a state procedural bar under Nevada
 20 state law. *Brown v. McDaniel*, 331 P.3d 867, 875 (Nev. 2014). Thus, a Nevada
 21 habeas petitioner who relies upon *Martinez*—and only *Martinez*—as a basis for
 22 overcoming a state procedural bar on an unexhausted claim can successfully
 23 argue that the state courts would hold the claim procedurally barred but that he
 24 nonetheless has a potentially viable cause-and-prejudice argument under federal
 25 law that would not be recognized by the state courts when applying the state
 26 procedural bars.

27 Here, Romero-Manzo advances only *Martinez* as a basis for excusing the
 28 anticipatory default of grounds 1(a) and 1(b). (See ECF No. 32.) Accordingly, the

1 Court considers grounds 1(a) and 1(b) technically exhausted and procedurally
2 defaulted. Because the cause and prejudice questions of overcoming the
3 procedural default of grounds 1(a) and 1(b) are necessarily intertwined with the
4 merits of grounds 1(a) and 1(b), the Court will defer a determination until the
5 time of merits determination. Accordingly, the motion to dismiss is denied
6 without prejudice. Respondents may renew their procedural default argument in
7 their answer.

8 **V. CONCLUSION**

9 It is therefore ordered that Respondents' motion to dismiss (ECF No. 27) is
10 denied as follows: grounds 1(a) and 1(b) are technically exhausted, but
11 procedurally defaulted. The Court defers consideration of whether Romero-Manzo
12 can demonstrate cause and prejudice under *Martinez v. Ryan* to overcome the
13 procedural default of grounds 1(a) and 1(b) until after the filing of an answer and
14 reply in this action.

15 It is further ordered that Respondents must file an answer to the second-
16 amended petition within 60 days of the date of this order. Romero-Manzo will
17 then have 30 days from service of the answer within which to file a reply.

18 DATED THIS 8th day of February 2024.

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ANNE R. TRAUM
UNITED STATES DISTRICT JUDGE